Award No. 16564
Docket No. CL-17223

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6322) that:

(a) Carrier violated the Clerks' Agreement when it failed to deny claim within the 60-day period provided therein and because of such violation, shall now be required to pay the following claim as presented:

(1) Mr. R. Pacelli, Clerk in the Bridge and Building Department was required under the Universal Military Training and Service Act (PL–86-632), and as amended to serve in the U. S. Army Reserve encampment from May 21, to June 4, 1966 inclusive. Mr. Pacelli was paid by the U. S. Army $82.35 as salary for the two week period.

(2) Mr. R. Pacelli shall now be compensated $144.25, the difference between his army pay and the pay he would have earned with the Carrier had he not been obliged under law to attend camp for training purposes.

EMPLOYES' STATEMENT OF FACTS: On June 26, 1966 Local Chairman Joseph P. Danehy filed the following claim in behalf of Claimant Pacelli:

"Mr. B. J. Furniss
B&B Supervisor
New Haven Railroad Company
New Haven, Connecticut

Dear Sir:

This is a claim in behalf of Mr. Remo Pacelli, Clerk B&B Department, New Haven, Connecticut.

Mr. Pacelli, a member of the U. S. Army Reserve, was required under the Universal Military Training and Service Act (P. L. 86-632) and as amended, to serve in the U. S. Army Reserve, from May 21 to June 4, 1966.

returned to the company's service following their attendance at the encampments. Copy of notice issued "To All Employing Officers" on April 6, 1965, renewing the policy for the year 1965, is attached as Carrier's Exhibit A.

The claimant, Mr. R. Pacelli, entered the employ of this company as clerk on January 4, 1966. During the period from May 24 to June 6, 1966, inclusive, he was absent from duty account attending military encampment as a member of the U. S. Army Reserve. For this military service he was paid $82.35 by the U. S. Army Reserve.

Notwithstanding the fact that Mr. Pacelli would not have been eligible for such reimbursement under our former policy for the reason that he did not have two years of service as of January 1, 1966, a claim was presented in his behalf under date of June 26, 1966, for payment of $144.25, representing the difference between the $82.35 which he received from the Army and the amount he would have received from the Carrier in wages had he not been absent account military encampment.

B&B Supervisor B. J. Furniss, to whom the claim was addressed, had been absent account illness since June 3, 1966, and terminated his service with this company on June 24, 1966, to apply for an annuity under the Railroad Retirement Act.

Under date of September 4, 1966, the Clerks' organization again wrote Mr. Furniss regarding the claim and requested payment on the basis of violation of Rule 21 — Claims and Grievances.

On September 9, 1966, Mr. W. E. Parry, who had replaced Mr. Furniss as B&B Supervisor, denied the claim.

On September 14, 1966, the Division Chairman appealed to Chief Engineer H. W. Jenkins, requesting that the claim be paid as presented because of violation of Rule 21.

Denial decision was rendered by Mr. Jenkins under date of September 30, 1966.

Under date of October 12, 1966, General Chairman S. M. Adinolfi appealed the claim to this office, and decision was rendered by the undersigned on November 22, 1966, copy attached as Carrier's Exhibit B.

Agreement, dated September 15, 1957, between this company and the Brotherhood of Railway Clerks, is on file with this Board and is, by reference, made a part of this submission.

(Exhibits not reproduced.)

OPINION OF BOARD: Clerks' Local Chairman, under date of June 26, 1966, addressed the following to the officer of Carrier authorized to receive claims or grievances:

> "This is a claim in behalf of Mr. Remo Pacelli, Clerk B&B Department, New Haven, Connecticut.

Mr. Pacelli, a member of the U. S. Army Reserve, was required under the Universal Military Training and Service Act (P. L. 86-632) and as amended, to serve in the U. S. Army Reserve, from May 21 to June 4, 1966.

Wihle at camp, with the U. S. Army, Mr. Pacelli, received as salary, $82.35. If he had not been required under the law to serve two weeks of training with the Army Reserve, he would have worked his own position and would have received $226.60 as pay.

"Under the Universal Military Training and Service Act, M. Pacelli shall be permitted to return to his position with such seniority status, pay and vacation as he would have had if he were not absent for training in the Armed Forces or the National Guard.

He should not be disadvantaged with respect to any rights based on contract or practice due to his statutory leave for training.

Because of the above mentioned law, past practice of the New Haven Railroad Company I'm asking that Mr. Pacelli, be paid the differential between his Army pay and the pay he would have received if he did not go to camp, from the Carrier.

This claim is to be in the amount of $144.25.

If you care to discuss this claim please advise, time and place."

On September 4, 1966 the Local Chairman wrote to Carrier's officer:

"On June 26, 1966 I sent you a claim in behalf of Mr. R. Pacelli, Clerk, B&B Department, New Haven, Connecticut.

This claim was in connection with Mr. Pacelli's service to the Army Reserve, under the Universal Military Training and Services Act (P. L. 86-632) and as amended. This claim was in the amount of $144.25.

The time limitations as set forth under our rule No. 21 are now over due and inasmuch as I have not heard from you, I'm asking that my claim be paid as presented."

Carrier's B&B Supervisor replied to both of the above letters on September 9, 1966:

"In reference to your letters of June 26 and September 4, 1966 to Mr. B. J. Furniss, B&B Supervisor, who is now retired, I will therefore answer your letters.

Instructions from Mr. J. J. Duffy, Director of Labor Relations and Personnel for the New Haven Railroad, are that no reimbursements for loss of time while employes are attending summer encampments of National Guard or U. S. Armed Forces in Active Reserve Service.

Employes may use their vacations if so desired and if it is convenient for management.

Therefore, I deny your claim in behalf of Mr. R. Pacelli."

Clerks appealed the denial to the highest officer of Carrier designated to handle appeals. On November 22, 1966, he addressed the following to Clerks' General Chairman:

"This will refer to your letter of October 12 and conference of November 9, 1966, your file No. 1072, Railroad Docket 10527, claim of Mr. R. Pacelli, Clerk, for reimbursement of wage loss while in military service. Claim was appealed on the basis of violation of the time limit on claims, Rule 21.

During the period from May 21 to June 4, 1966, inclusive, Mr. Pacelli was absent from duty account attending military encampment as a member of the U. S. Army Reserve. For this military service he was paid $82.35 by the U. S. Army Reserve.

Admittedly, it had been the policy of this Company to make good the difference in earnings to employes while attending such encampments. Commencing with the calendar year 1966, the Trustees discontinued this policy.

The establishment or discontinuance of a Company policy is not a matter of contractual obligation under any of our labor agreements, but rests solely within the discretion of the management. This being so, there can be no agreement violation subject to handling under the grievance rule. The fact that Mr. B. J. Furniss, former B&B Supervisor, did not reply to Mr. Danehy's letter of June 26 within sixty days does not constitute a violation of Rule 21, since the request was never a matter subject to handling under that rule. (Emphasis ours.)

The claim must be and is hereby denied."

The pertinent Rule of the Agreement reads:

"RULE 21.

CLAIMS, GRIEVANCES AND APPEALS

1. All claims or grievances arising on or after January 1, 1966, shall be handled as follows:

(a) All **claims or grievances** must be presented in writing by or on behalf of the employe involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. **Should any such claim or grievance be disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance** (the employe or his representative) **in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented,** but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances."
(Emphasis ours.)

Inasmuch as Carrier admits that its officer authorized to receive "claims or grievances" did not disallow the "claim" presented to him under date of June 26, 1966, within 60 days; the issue is whether Carrier was contractually obligated under Rule 21 to disallow the "claim," giving its reasons in writing, within 60 days from the date of filing.

Carrier states its position as:

"There is no rule or agreement with the Clerks, or any other organization, requiring reimbursement of loss of earnings to employes while attending military encampment. Therefore, the claim for reimbursement to Claimant was not a matter subject to handling under Rule 21, and the fact that reply was not made within sixty days cannot constitute a violation of that rule.

It has been argued that:

The position of the Carrier in this respect is well taken. It is well settled that jurisdiction for hearing disputes between the Carriers and their employes by the National Railroad Adjustment Board is derived solely from the Railway Labor Act, as amended.

Section 2 of the Railway Labor Act covering the general purpose of the Act reads in part as follows:

'(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions;

(5) to provide for the prompt and orderly settlement **of all disputes growing out of grievances or out of interpretation or application of agreements** covering rates of pay, rules, or working conditions.'

The jurisdiction of the National Railroad Adjustment Board is defined in Section 3. First (i) of the Railway Labor Act which reads in part as follows:

'The disputes between an employe or group of employes and a Carrier or Carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, * * * shall be handled in the usual manner up to and including the chief operating officer of the Carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board * * *.'

It is, therefore, crystal clear, both in the language set forth in the general purposes of the Act and in the section defining jurisdiction of the Adjustment Board, that the disputes referred to in the Act concern rates of pay, rules, or working conditions. Failing in this respect, the disputes, therefore, do not meet the essential qualifications for progression through the steps of labor relations handling and Adjustment Board referral."

Section 3, First (i) of the Railway Labor Act by the language "grievances OR out of the interpretation or application of agreements;" and, Section 2 (5) of the Act makes clear that this Board's jurisdiction extends to "grievances" ("disputes") other than claims of violation of a specific rule or rules of a collective bargaining agreement.

The Supreme Court in Gunther v. San Diego & A. E. Railway, 382 U. S. 257 (1965) held that a collective bargaining agreement can be violated in the absence of a specific prohibitory rule.

Rule 21 of the confronting Agreement, which is a reproduction of Section V, 1 (a) of the National Agreement of August 21, 1954, contractually obligates a Carrier to disallow a "claim or grievance" within 60 days of its filing, giving its reasons for disallowance in writing, under pain of allowance "as presented" if those procedural requirements are not complied with. There are no exceptions. A Carrier may not disregard a filed claim because it, in the Carrier's opinion, is: (1) without merit; (2) is not supported by the Rules Agreement; or, (3) is not a dispute within the contemplation of the Railway Labor Act. Carrier's obligation to deny any claim filed within 60 days of filing, giving its reasons for disallowance in writing, is, by application of Rule 21, absolute. Since Carrier failed in this contractual obligation we are compelled, by Rule 21, to sustain the instant claim as presented.

We do not reach the merits of the claim. We make no decision, in this case, as to whether a Carrier's unilaterally established policy of emoluments of employment may be unilaterally terminated by Carrier.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated Rule 21 of the Agreement and the claim must be allowed as presented.

AWARD

Claim sustained as presented.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of September 1968.

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